88-1550

No. ———

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

———

MISSOURI PACIFIC RAILROAD COMPANY,
Appellant

v.

BETTY L. MACKEY, EXECUTRIX OF THE ESTATE OF CLEO FRANKLIN MACKEY, DECEASED,
Appellee

———

On Appeal from the Supreme Court of Arkansas

———

JURISDICTIONAL STATEMENT

———

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QUESTION PRESENTED

Whether the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1982 and Supp. IV 1987), and the regulations promulgated thereunder pertaining to railway roadbed vegetation, preempt an Arkansas statute, *Ark. Code Ann.* § 23-12-201 (1987), which regulates the growth of vegetation near railroad crossings.

PARTIES BELOW

A. Parties Below

At trial and on appeal to the Arkansas Supreme Court, Betty L. Mackey, Executrix of the Estate of Cleo Franklin Mackey, Deceased, Missouri Pacific Railroad Company and Union Pacific Railroad Company were the parties to this litigation. On appeal, the Arkansas Supreme Court reversed and dismissed the trial court's judgment against Union Pacific Railroad.

B. Corporate Affiliations

Missouri Pacific Railroad is a wholly owned subsidiary of Union Pacific Corporation. Other wholly owned operating companies of Union Pacific Corporation that are affiliates of Missouri Pacific are:

Union Pacific Corporation (parent)

Union Pacific Railroad

Overnite Transportation Company

Union Pacific Realty Company

Union Pacific Technologies, Inc.

USPCI, Inc.

Union Pacific Resources Company

Subsidiaries of Missouri Pacific Railroad, other than wholly owned subsidiaries, are:

Southern Illinois & Missouri Bridge Co.

The Alton & Southern Railway Co.

Brownsville & Matamoros Bridge Co.

Galveston-Houston-Henderson Railroad Co.

Houston Belt & Terminal Railway Co.

Terminal Railway Association of St. Louis

Arkansas & Memphis Railway Bridge & Terminal Co.

Kansas City Terminal Railway

Belt Railway Co. of Chicago

Chicago & Western Indiana Railroad

Texas City Terminal Railway Co.

Trailer Train Co.

C. State Of Arkansas Possible Party

Since this proceeding draws into question the constitutionality of a state statute, and since the State of Arkansas is not a party hereto, pursuant to Supreme Court Rule 28.4(c), appellant states that 28 U.S.C. § 2403(b) may be applicable and this jurisdictional statement accordingly shall be served upon the Attorney General of the State of Arkansas.

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Appellant

v.

BETTY L. MACKEY, EXECUTRIX OF THE
ESTATE OF CLEO FRANKLIN MACKEY, DECEASED,
Appellee

On Appeal from the Supreme Court of Arkansas

JURISDICTIONAL STATEMENT

Missouri Pacific Railroad Company appeals from the judgment of the Arkansas Supreme Court holding that the federal regulation covering roadbed vegetation does not preempt an Arkansas statute covering the same subject matter.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court from which this appeal is taken is reported as *Missouri P. R.R. v. Mackey*, 297 Ark. 137, 760 S.W.2d 59 (1988), in which the Arkansas Supreme Court reversed and remanded the judgment of the Sebastian County Circuit Court, the Honorable Floyd G. Rogers, Circuit Judge, presiding. The Arkansas Supreme Court opinion is reproduced in the Appendix of this Jurisdictional Statement. The

Arkansas Supreme Court's order denying Missouri Pacific Railroad Company's Petition for Rehearing is unreported and is reproduced in the Appendix of this Jurisdictional Statement.

JURISDICTIONAL GROUNDS

This is an appeal from a decision of the Arkansas Supreme Court rendered on November 21, 1988. Appellant's Petition for Rehearing was denied on December 19, 1988. Notice of appeal to this Court was filed with the Arkansas Supreme Court on February 20, 1989. This appeal is being docketed within 90 days of the denial of the Petition for Rehearing. Jurisdiction for appeal to this Court is conferred by 28 U.S.C. § 1257(2). Appellants challenge the validity of the Arkansas railroad roadbed vegetation statute, *Ark. Code Ann.* § 23-12-201 (1987) on the grounds that the statute is preempted by the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44, and the regulations promulgated thereunder, and is repugnant to the supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2. The decision of the Arkansas Supreme Court appealed from was in favor of the validity of the state law, the court finding no preemption.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Constitutional Provision Involved

The supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitu-

tion or Laws of any State to the Contrary notwithstanding.

B. Federal Statutes Involved

(i) Section 101 of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 421 (1982), provides:

> § 421. Congressional Declaration of Purpose.
>
> The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons and to reduce damage to property caused by accidents, involving any carrier of hazardous materials.

(ii) Section 202(a) of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 431 (1982), provides:

> § 431. Promulgation of Rules, Regulations, Orders and Standards.
>
> (a) Authority of Secretary; collective bargaining agreements under Railway Labor Act as consistent with rules, etc.
>
> The Secretary of Transportation (hereafter in this subchapter referred to as the "Secretary") shall (1) prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety supplementing provisions of law and regulations in effect on October 16, 1970, and (2) conduct, as necessary research, development, testing, evaluation, and training for all areas of railroad safety. However, nothing in this subchapter shall prohibit the bargaining representatives of common carriers and their employees from entering into collective bargaining agreements under the Railway Labor Act (45 U.S.C. § 151 et seq.), including agreements relating to qualifications of employees, which are not inconsistent with rules, regulations, orders, or standards prescribed by the Secretary under this subchapter. Nothing in this subchapter shall be con-

strued to give the Secretary authority to issue rules, regulations, orders and standards relating to qualifications of employees, except such qualifications as are specifically related to safety.

(iii) Section 205 of the Railroad Safety Act of 1970, 45 U.S.C. § 434 (1982), provides:

> § 434. National Uniformity of Laws, Rules, Regulations, Orders, and Standards Relating to Railroad Safety and State Regulation.
>
> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order or standard, and when not creating an undue burden on interstate commerce.

C. Arkansas Statute Involved

Ark. Code Ann. § 23-12-201 (1987) provides:

> § 23-12-201. Maintenance of Right-of-Way Free from Obstructions—Penalty.
>
> (a) All railroad corporations operating in this state shall maintain their right-of-way at or around any railroad crossing of a public road or highway free from grass, trees, bushes, shrubs, or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways. The maintenance of the right-of-way shall be for a distance of one hundred (100) yards in all right-of-way directions from the railroad crossing.

(b) Any railroad corporation failing or refusing to comply with the provisions of this section shall be subject to a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) for each violation.

D. Federal Regulations Involved

(i) 49 C.F.R. § 1.49(m) (1987) provides:

§ 1.49 Delegations to Federal Railroad Administrator.

The Federal Railroad Administrator is delegated authority to:

(m) Carry out the functions vested in the Secretary by the Federal Railroad Safety Act of 1970 (Title II of Pub.L. 91-458); 84 Stat. 971, 45 U.S.C. § 421 et seq.), except section 204(b) (84 Stat. 972, 45 U.S.C. § 433(b)) with respect to highway, traffic, and motor vehicle safety and highway construction.

(ii) 49 C.F.R. §§ 213.31, .37 (1987) provide:

Subpart B—Roadbed

§ 213.31 Scope.

This subpart prescribes minimum requirements for roadbed and areas immediately adjacent to roadbed.

* * * *

§ 213.37 Vegetation.

Vegetation on railroad property which is on or immediately adjacent to roadbed must be controlled so that it does not—

(a) Become a fire hazard to track carrying structures;

(b) Obstruct visibility of railroad signs and signals;

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communication lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

STATEMENT OF THE CASE

On July 27, 1984, Cleo Mackey was killed in a collision with a Missouri Pacific Railroad Company train at a state highway crossing near Branch, Arkansas. Mr. Mackey's executrix brought a negligence action against Missouri Pacific Railroad Company seeking money damages.[1] In her Complaint, the executrix alleged, *inter alia*, that the defendant railroad's maintenance of the right-of-way at the location of the accident was in violation of *Ark. Code Ann.* § 23-12-201 (1987) (formerly codified as *Ark. Stat. Ann.* § 73-631) and that such violation amounted to negligence which was a proximate cause of the decedent's death. In its Answer to the Amended Complaint Defendant Missouri Pacific Railroad Company raised as an affirmative defense that *Ark. Stat. Ann.* § 73-631 was invalid, unconstitutional and unenforceable in that the said statute had been preempted by federal law, specifically by the provisions of the Federal Railroad Safety Act, 45 U.S.C. §§ 421-41 (1982) and by the rules and regulations promulgated thereunder by the Federal Railroad Administration. Further, Defendant Missouri Pacific alleged that the supremacy and commerce clauses of the United States Constitution, the Federal Railroad Safety Act and the specific provisions of the regulations pursuant to the Act rendered the state statute void.

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[1] Prior to trial plaintiff joined Union Pacific Railroad as a party defendant. The trial court judgment was entered against both Missouri Pacific and Union Pacific. On appeal, the Arkansas Supreme Court reversed *in toto* any judgment against Union Pacific.

Congress enacted the Federal Railroad Safety Act ("FRSA"), Pub. L. No. 91-458, 84 Stat. 971 (1970) (codified at 45 U.S.C. §§ 421-44 (1982 and Supp. IV 1987)), in response to deteriorating railroad tracks, roadbed and safety equipment. In doing so, Congress specifically addressed the states' role in regulating railway safety:

> With the exception of industrial or plant railroads the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system . . . . To subject a carrier to enforcement before a number of different state administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4110-11. Congress explicitly enumerated the purposes of the FRSA. 45 U.S.C. § 421 (1982).

The FRSA imposed upon the United States Secretary of Transportation the duty to prescribe rules, regulations, orders and standards for all areas of railroad safety. 45 U.S.C. § 431 (1982). The Secretary of Transportation delegated those responsibilities to the Federal Railroad Administration (FRA), a unit of the Department of Transportation. 49 C.F.R. § 1.49(m) (1987).

Prior to trial defendants moved for partial summary judgment as to any claim that Missouri Pacific's maintenance of the right-of-way and crossing in question was in violation of state law on grounds that the state statute was unconstitutional and preempted by federal law. The Motion for Partial Summary Judgment was denied by the trial court during pre-trial proceedings. At trial, the trial court instructed the jury, *inter alia*, that a violation of the Arkansas vegetation statute, *Ark.*

Code Ann. § 23-12-201 (1987), was evidence of negligence to be considered by the jury. The instruction was given over defendants' objections on grounds that the statute was preempted by federal law. On September 10, 1987 pursuant to a jury verdict, the trial court entered judgment against Defendants Missouri Pacific Railroad Company and Union Pacific Railroad Company and in favor of the plaintiffs in the sum of $450,000 in actual damages and $100,000 in punitive damages. Defendants appealed from this judgment to the Arkansas Supreme Court. As one basis of their appeal, defendants again urged that the Arkansas vegetation statute was preempted by federal law and that the trial court had erred in submitting the issue to the jury. In an opinion filed November 21, 1988, the Arkansas Supreme Court reversed the judgment and remanded the case for a new trial. However, the Arkansas Supreme Court upheld the trial court's instruction concerning the Arkansas vegetation statute and rejected the railroad's position on appeal that the statute was preempted under federal law. In rejecting the railroad's contention, the Arkansas Supreme Court noted that the testimony concerning vegetation on the right-of-way in question established that the growth occurred both on the roadbed and on areas of the right-of-way outside the roadbed. The Arkansas Supreme Court proceeded to quote both the Arkansas statute and the federal regulation in question and then stated:

> It is obvious on the face of the rules that the federal regulation is expressly for the purpose of preventing fire hazards to track carrying structures and equipment and to prevent interference with employee's performance of their duties. On the other hand, the Arkansas statute clearly is intended to protect pedestrians and operators of vehicles.

297 Ark. at 146, 760 S.W.2d at 64. With no further substantive discussion, the Arkansas Supreme Court

stated that it was quite evident that the state and federal laws could be read together without conflict and found that the Arkansas statute was not preempted under any of the three tests enunciated in *Hillsboro County, Florida v. Automated Medical Laboratory, Inc.*, 471 U.S. 707 (1985).

A timely Petition for Rehearing was filed by Missouri Pacific on December 8, 1988. The Arkansas Supreme Court denied Petition for Rehearing on December 19, 1988. On February 20, 1989 Missouri Pacific Railroad Company filed its Notice of Appeal herein with the Arkansas Supreme Court and with the Circuit Court of Sebastian County, Arkansas.

THE QUESTION IS SUBSTANTIAL

I. Introduction

The question presented by this appeal is substantial enough to require plenary consideration, with briefs on the merits and oral argument, for its resolution. The decision of the Arkansas Supreme Court on the railroad vegetation preemption issue is unsupported by the record and this Court should reverse the judgment below on the preemption issue based upon this jurisdictional statement. At the very least, should the Court not reverse based upon this jurisdictional statement, briefs on the merits and oral arguments are merited. The holding of the Arkansas Supreme Court that federal regulations governing railroad roadbed vegetation do not preempt the Arkansas vegetation statute is contrary to the clear and express congressional purpose underlying the Federal Railroad Safety Act of 1970, Pub. L. 91-458, 84 Stat. 971 (1970) (codified as amended at 45 U.S.C. §§ 421-44 (1982 and Supp. IV 1987)). The Arkansas Supreme Court's decision lacks any meaningful analysis, explanation and application of the well settled preemption doctrine. Since the Arkansas Supreme Court reversed on other issues, it appears as though the court was of the

opinion that a thorough analysis of the preemption issue was unnecessary.

The question presented is also substantial because of the burden that statutes such as the one at issue place on railroads. Congress recognized this burden on the railroad industry when it declared: "laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable." 45 U.S.C. § 434 (1982). The legislative history of the FRSA could not be more clear in this regard. For instance, the House Committee on Interstate and Foreign Commerce stated:

> The committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems. Accordingly, while it has preserved the framework of certification, it has modified the concept insofar as it applies to the Nation's rail system to make all enforcement Federal in nature. The Secretary will have exclusive authority to assess and compromise penalties and to recommend court action for recovery of such penalties. In addition, for 180 days after a violation has occurred, he will have exclusive authority to seek injunctive relief. Thereafter, participating States will have authority to seek injunctive relief in Federal courts. They will have no authority to assess and compromise penalties or to seek State judicial action. In addition, if the Secretary finds, in writing, that no violation occurred, States cannot act. It should be noted here that the vital element in certification whereby a State has the clear right to participate in the administration of the act is retained.

H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4109. Statutes such as the Arkansas vegetation statute unduly burden interstate railroads because they create

a multiplicity of regulation. Such statutes also stand as an obstacle to the clear congressional purpose of promoting uniform railroad safety standards.

The Arkansas Supreme Court's failure to recognize the congressional intent behind the FRSA is inconsistent with the supremacy clause of the United States Constitution, U.S. Const. art. VI., cl. 2, and this Court's numerous precedents declaring that congressional intent forms the measure by which courts determine preemption. *See California Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). This failure to recognize congressional intent, in and of itself, makes the question presented a substantial one.

II. The Arkansas Supreme Court Erred in Upholding the Arkansas Vegetation Statute.

The Arkansas railroad vegetation statute provides:

> § 23-12-201. Maintenance of Right-of-Way Free from Obstructions—Penalty.
>
> (a) All railroad corporations operating in this state shall maintain their right-of-way at or around any railroad crossing of a public road or highway free from grass, trees, bushes, shrubs, or other growing vegetation which may obstruct the view of pedestrians and vehicle operators using the public highways. The maintenance of the right-of-way shall be for a distance of one hundred (100) yards in all right-of-way directions from the railroad crossing.

Ark. Code Ann. § 23-12-201(a) (1987). The preemptive federal regulation on this point provides:

> Subpart B—Roadbed
>
> § 213.31 Scope.
>
> This subpart prescribes minimum requirements for roadbed and areas immediately adjacent to roadbed.
>
> * * * *

§ 213.37 Vegetation.

Vegetation on railroad property which is on or immediately adjacent to roadbed must be controlled so that it does not—

(a) Become a fire hazard to track carrying structures;

(b) Obstruct visibility of railroad signs and signals;

(c) Interfere with railroad employees performing normal trackside duties;

(d) Prevent proper functioning of signal and communication lines; or

(e) Prevent railroad employees from visually inspecting moving equipment from their normal duty stations.

49 C.F.R. §§ 213.31, .37 (1987).

Without reference to the legislative history of the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 421-44 (1982), the Arkansas Supreme Court noted:

> It is obvious on the face of the rules that the federal regulation is expressly for the purpose of preventing fire hazards to track carrying structures and equipment and to prevent interference with employees' performance of their duties. On the other hand, the Arkansas statute clearly is intended to protect pedestrians and operators of vehicles.

Missouri P. RR. v. Mackey, 297 Ark. 137, 146, 760 S.W.2d 59, 64 (1988). Without reference to the legislative history supporting the federal regulation, the Arkansas Supreme Court held: "In fact, it is quite evident that the state and federal laws can be read without conflict. Therefore, *Ark. Code Ann.* § 23-12-201 (1987) has not been preempted by federal law." 297 Ark. at 147, 760 S.W.2d at 64.

A review of the legislative history and language of the Federal Railroad Safety Act of 1970 leaves no doubt that the Arkansas Supreme Court erred in upholding the validity of the Arkansas statute. The House Committee on Interstate and Foreign Commerce summarized the purpose of the legislation as follows:

> The primary purpose of this legislation as set forth in title I is to promote safety in all areas of railroad operations, to reduce railroad accidents, to reduce deaths and injuries to persons and to reduce property damage caused by accidents involving any carrier of hazardous materials.

H.R. Rep. No. 91-1194, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Admin. News 4104, 4104. Congress codified its declaration of purpose which appears at 45 U.S.C. § 421 (1982).

Describing the legislation in its report, the committee noted:

> The committee has reported a Federal railroad safety bill which permits State participation in the administration of the Federal safety program and, to a limited degree, permits the States to enforce Federal rail safety regulations . . . .

H.R. Rep. No. 91-1194, *supra*, at 4104-05. The committee thus recommended passage of the legislation in view of the need for uniformity in railroad safety laws. The congressional concern for railroad safety encompassed not only fire hazards and non-interference with railroad employees' duties, but all facets of railroad safety, including grade-crossing accidents. *Id.* at 4106, 4107, 4116.

The legislative history concerning the Federal Railroad Safety Act of 1970 also includes explicit commentary on the states' roles in the field of railroad safety:

> At the present time where the Federal Government has authority, with respect to rail safety, it preempts the field. With respect to the reported bill,

> the task force recommended that existing State requirements remain in effect until preempted by Federal action.
>
> * * * * *
>
> The committee does not believe that safety in the Nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems. Accordingly, while it has preserved the framework of certification, it has modified the concept insofar as it applies to the Nation's rail system to make all enforcement Federal in nature.

Id. at 4108-09. The committee elaborated on the need for a single, uniform set of railroad safety laws:

> With the exception of industrial or plant railroads, the railroad industry has very few local characteristics. Rather, in terms of its operations, it has a truly interstate character calling for a uniform body of regulation and enforcement. It is a national system. Unlike the gas pipeline, the vast bulk of railroad mileage, and operations thereover, are by companies whose operations extend over many State lines . . . . To subject a carrier to enforcement before a number of different State administrative and judicial systems in several areas of operation could well result in an undue burden on interstate commerce.

Id. at 4110-11.

Congress, however, left a narrow avenue available for state regulation, *i.e.*, to deal with local hazards. The committee emphasized the limited area left to state regulation in the following language:

> Section 205 of the bill declares that it is the policy of Congress that rail safety regulations be nationally uniform to the extent practicable. It provides, however, that until the Secretary acts with respect to a particular subject matter, a State may continue to regulate in that area. Once the Secretary has pre-

> scribed a uniform national standard the State would no longer have authority to establish Statewide standards with respect to rail safety. The State may, however, adopt or continue in force an additional or more stringent requirement when necessary to eliminate or reduce an essentially local safety hazard, provided it is not incompatible with Federal requirements and does not create an undue burden on interstate commerce.
>
> The purpose of this latter provision is to enable the states to respond to local situations not capable of being adequately encompassed within uniform national standards. The States will retain authority to regulate individual local problems where necessary to eliminate or reduce esentially local railroad safety hazards. Since these local hazards would not be Statewide in character, there is no intent to permit a State to establish Statewide standards superimposed on national standards covering the same subject matter.

Id. at 4116-17. *See* 45 U.S.C. § 434 (1982).

Consequently, unless the Arkansas statute satisfies each prong of the three-prong test set out in § 434 of the Federal Railroad Safety Act of 1970, the federal regulation totally preempts the field. This result necessarily follows under the settled preemption doctrine oft times declared by this Court. The preemption doctrine, deriving from the supremacy clause of the United States Constitution, U.S. Const., art. VI, cl. 2, involves solely the ascertainment of congressional intent. *California Savings and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987). Congress may preempt state laws in three ways. First, Congress may, as here, expressly state that its enactments preempt state laws regulating the subject matter. Second, Congress may create, as it did with the Federal Railroad Safety Act of 1970, such an extensive network of regulations that the federal law has "occupied the field," leaving no room for state regulation. Finally, a

congressional enactment may preempt a state law to the extent that such state law conflicts with or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See Jones v. Rath Packing Co.*, 430 U.S. 519 (1977).

In *Missouri P. RR. v. Railroad Comm'n of Texas*, 653 F.Supp. 617 (W.D. Tex.), *rev'd and remanded*, 833 F.2d 570 (5th Cir. 1987), the district court specifically addressed the federal regulation's preemptive effect upon a Texas statute similar to the Arkansas statute. The Texas statute provided:

> Each railroad corporation shall control vegetation on its right-of-way (except for the roadbed and area immediately adjacent thereto) for a distance of 500 feet each way from every public grade crossing so that it does not obscure the view of approaching trains to vehicular highway traffic.

16 T.A.C. § 5.620(b) (1986). The court recognized that the Texas statute attempted to avoid a conflict with the federal vegetation regulation in two ways. First, the Texas statute, like the Arkansas statute, addressed railroad rights-of-way rather than "roadbeds." Second, the Texas statute stated its purpose as the avoidance of obstructions to motorists' views of approaching trains. The Arkansas statute also seeks to avoid obstructions to the view of pedestrians and motorists of approaching trains.

Analyzing the Texas statute, the court found:

> Neither distinction saves the regulation from preemption. First, the railroad right-of-way is an area immediately adjacent to the roadbed. No contrary definition exists partially because any contrary definition would defy logic. In fact, the record reflects that the Defendants themselves cannot differentiate between the "right-of-way" and "property imme-

> diately adjacent to roadbed." Both areas are the same.
>
> Further, the fact that the federal regulation addresses vegetation control with an objective different than that of the state is of no import. . . . Moreover, the FRA expressly addressed vegetation control on right-of-ways from the perspective of motorist visibility during the deliberation and public comment period that proceeded the adoption of the federal regulation. The Washington Utilities and Transportation Commission and the National Transportation Safety Board both recommended that vegetation be controlled to ensure railroad grade crossing visibility. The FRA considered both proposals and rejected both proposals. The *FRA consideration and rejection of such rules acts as an affirmative ruling that such a rule is inappropriate.* . . . (Emphasis ours)

635 F. Supp. at 626 (citing *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132 (1963); and *Napier v. Atlantic Coast Line RR. Co.*, 272 U.S. 605 (1926)).

The district court found that the Texas vegetation statute was preempted by federal regulation and granted summary judgment to that effect. On appeal, the Fifth Circuit Court of Appeals reversed and remanded. The Court of Appeals found language in the Texas vegetation statute which saved it from preemption. As noted earlier, the Texas statute sought to control vegetation on rights-of-way, but specifically excepted from its application the "roadbed and area immediately adjacent thereto," (the area covered by the federal regulation). 16 T.A.C. § 5.620(b) (1986). Accordingly, in a uniquely reasoned opinion which also seems to "defy logic," the Court of Appeals held that there was no conflict between the federal regulation and the Texas statute because each regulated a different part of the right-of-way. *Missouri P. RR. v. Railroad Comm'n of Texas*, 833 F.2d 570 (5th Cir. 1987).

The Arkansas statute clearly contains no savings language such as was found to exist by the Fifth Circuit Court of Appeals in the Texas statute; it seeks to regulate maintenance of the same physical area covered by the federal regulation. Accordingly, the Arkansas statute cannot withstand preemptive scrutiny. The Federal Railroad Administration expressly rejected regulations similar to the Arkansas statute and that body's rejection of federal regulation on the subject prevents a state from enacting such laws or regulations. The federal scheme occupies the field of vegetation control.

Although the Arkansas statute operates in a field occupied by federal regulation, which establishes the statute's invalidity, the statute also fails the first requisite prong of the narrow preemption exception, which requires that permitted state regulations address only *local* rail safety hazards. Courts which have been faced with the issue have consistently held that the first prong of the test does not authorize the imposition of *statewide* standards under the guise that they were enacted to deal with "local hazards." *National Ass'n of Regulatory Utilities Commissioners v. Coleman*, 542 F.2d 11 (3d Cir. 1976); *Consolidated Rail Corp. v. Pennsylvania Public Utility Comm'n*, 536 F. Supp. 653 (E.D. Pa.), *aff'd mem.*, 696 F.2d 981 (3d Cir.), *aff'd mem.*, 461 U.S. 912 (1982); and *Atchison, Topeka & Santa Fe Ry. v. Illinois Commerce Comm'n*, 453 F. Supp. 920 (N.D. Ill. 1977). Since the Arkansas statute is statewide in scope, the first prong of the exception remains unfulfilled. The federal regulation preempts the Arkansas statute and the trial court erred in instructing to the jury with regard to its application. Likewise, the Arkansas Supreme Court erred in not invalidating the statute.

CONCLUSION

The federal regulation covering railroad vegetation preempts the Arkansas vegetation statute. The legislative history of the Federal Railroad Safety Act of 1970 establishes beyond doubt that Congress intended to preempt all state railroad safety regulations in areas covered by federal regulations, unless the state statute at issue meets the narrow three-prong test of § 434. Obviously, a state statute statewide in scope and in application cannot meet the criteria of § 434. The failure of the Arkansas Supreme Court to so hold jeopardizes the entire federal statutory scheme of railroad safety regulation. The Arkansas Supreme Court's upholding of the statute's validity runs contrary to the indisputable congressional intent behind the federal regulatory scheme. The Arkansas Supreme Court's holding did not meaningfully analyze the question in view of the supremacy clause and in view of this Court's numerous precedents thereunder. For these reasons, the question presented is so substantial as to require plenary consideration by this Court since it goes to the very core of our federal system of jurisprudence.

Respectfully submitted,

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